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In the Supreme Court of the United States

OCTOBER TERM, 1994

BLUE STREAK, INC.
BLUE STREAK OPERATIONS, INC.
BLUE STREAK MARINE, INC.
and BLUE STREAK OFFSHORE, INC.
Petitioners

vs.

GULF ISLAND IV, INC.,
and GULF ISLAND-IV, a Louisiana Partnership
Respondents

WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENTS GULF ISLAND IV, INC. and GULF ISLAND-IV, a Louisiana Partnership

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BY RESPONDENTS GULF ISLAND IV, INC. and
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STATEMENT OF THE CASE

I. THE 1985 ACTION

In June of 1985, the L/B GULF ISLAND IV capsized in the Gulf of Mexico, while being operated by the now

dissolved partnership of Blue Streak/Gulf Island Operations ("BS-GIO"). In October 1985, after the vessel had been repaired, it suffered additional damage in Hurricane Juan.

On December 18, 1985, the vessel owner, Gulf Island IV, a Louisiana partnership, filed a "Complaint for Declaratory Judgment and Damages" against its hull insurer, Employers Insurance of Wausau ("Wausau"), and American Marine Underwriters ("AMU"). The 1985 action sought a declaration of Wausau's liability under the hull policy and damages for its refusal to pay damages for loss of charter hire resulting from downtime after Hurricane Juan. The 1985 action did not include claims for downtime of the L/B GULF ISLAND IV after the June 28, 1985 casualty or make any claim against any of the Blue Streak entities or any liability underwriters of those entities.

While the 1985 suit was pending, several actions were consolidated with it, including a suit brought by Hope Contractors, Inc. ("Hope Contractors suit"). In the Hope Contractors suit, the plaintiff-contractors named, among others, the following defendants: Gulf Island IV, Gulf Island IV, Inc., Gulf Island Marine, Inc., and "Blue Streak/Gulf Island". The Hope Contractors suit sought payment on an account for post-casualty salvage and repairs to the vessel. Gulf Island impleaded AMU and Wausau, seeking coverage under the hull policy for the salvage and repairs performed by Hope Contractors. It is important to note that "Blue Streak/Gulf Island" was not served and did not appear in the Hope Contractors suit.

On or about September 29, 1986, the Gulf Island

entities and Wausau verbally agreed to a settlement of the claims. The district court entered an Order of Dismissal without prejudice, subject to a reopening of the action within 60 days if settlement was not consummated. Although a form Receipt and Release was drafted by Wausau, it was never executed because it was broader than the terms of the oral settlement discussions and did not comport with Gulf Island's understanding of the proposed settlement. To date, no settlement agreement concerning the 1985 action has ever been signed by the parties nor has any settlement been recited in open court. Accordingly, no final judgment has been entered concerning the 1985 action.

II. THE PARTIES IN THE PRESENT ACTION

On June 27, 1988, Gulf Island IV and Gulf Island IV, Inc. (hereinafter collectively "Gulf Island") filed the instant admiralty and maritime suit against Blue Streak Marine, Inc., Blue Streak Offshore, Inc. (hereinafter collectively "Blue Streak") and Wausau for negligence, breach of warranty of workmanlike performance and for losses due to down time of the vessel resulting from the June 18, 1985 casualty. Blue Streak filed a third-party complaint against Underwriters at Lloyd's, London ("Lloyd's") seeking coverage under its umbrella policy. Blue Streak also filed a cross-claim against Wausau seeking coverage under its own protection and indemnity insurance policy, alleging that the policy required Wausau to protect and indemnify Blue Streak from the claims asserted by Gulf Island.[1] Gulf

[1] Wausau was dismissed from this action on summary judgment based on a finding that coverage did not exist under the policies.

Island later supplemented its complaint to name Lloyd's as a defendant, seeking the benefits of coverage under Blue Streak's umbrella policy.

Blue Streak and Lloyd's filed motions for summary judgment, arguing that *res judicata* bars this action. Specifically, they asserted that the September 29, 1986 dismissal order in the 1985 action bars this action. The district court granted summary judgment in favor of Lloyd's and Blue Streak, following which Gulf Island appealed. The Fifth Circuit reversed as to both Blue Streak and Lloyd's, holding that for *res judicata* to apply, the parties in the present action must to be identical to or in privity with parties in the prior 1985 suit.

The Fifth Circuit found that even assuming arguendo that Blue Streak is in privity with "Blue Streak/Gulf Island," the named but unserved defendant in the 1985 suit, because that entity was not properly before the court in the 1985 action, the identity of the parties' requirement is not satisfied. The court further found that Blue Streak was not in privity with Wausau, the insurer Gulf Island sued in the 1985 action, since Gulf Island sued Wausau in the 1985 action as a named insured under the Wausau hull policy, not in a third party liability context.

Thus, the 1985 action and the instant matter are differentiated by the parties, the causes of action and the damages sought.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT RAISE SPECIAL AND IMPORTANT REASONS FOR REVIEW

Petitioner asserts that this Court should grant certiorari because this case presents an important question of federal law which has not been, but should be settled by this Court. Petititon cites *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971), in which this Court eliminated the requirement of mutuality in applying collateral estoppel to bar relitigation of issues decided in earlier federal court suits. Since *Blonder-Tongue*, this Court has affirmed the elimination of the mutuality rule in the issue preclusion setting. See e.g., *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981); *Nevada V. United States*, 463 U.S. 110, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983). The elimination of the mutuality rule for issue preclusion has been widely accepted by the courts of appeals. The courts have not, however, expanded the elimination of the mutuality rule beyond issue preclusion to claim preclusion, as petitioner would have this Court now do. Thus, there is no conflict between the circuits and this Court on the application of the mutuality rule to claim preclusion.

It is an established principle that this Court will only adjudicate actual, ongoing controversies. *Honig v. Doe*, 484 U.S. 305, 317, 108 S. Ct. 592, 601, 98 L. Ed. 2d 686 (1988). The judiciary, including this Court, is not empowered to render advisory opinions. *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 2334, 45 L. Ed. 272

(1975). Additionally, as this Court has recognized, "jurisdiction was not conferred upon this [C]ourt merely to give the defeated party . . . another hearing." *Magnum Import Co. v. Coty,* 262 U.S. 159, 163, 43 S. Ct. 531, 532, 67 L. Ed. 922 (1923). Moreover, this Court has defined "special and important" reasons which warrant review as those that reach beyond the academic and episodic. *Rice v. Sioux City Memorial Park Cemetary,* 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897 (1955).

> It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Layne C. Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (1923).

In the present matter, Blue Streak has not provided any basis for review upon petition for writ of certiorari by this Court. As indicated above, no conflict exists between the decisions of this Court and the courts of appeals. Further, no unresolved issue of law exists. While petitioner raises a concept which is possibly of interest from a scholarly standpoint, is not appropriate for review on petition for writ of certiorari.

II. THE REQUISITES OF CLAIM PRECLUSION ARE NOT SATISFIED IN THIS MATTER.

In order for claim preclusion to apply, four requirements must be met. First, the parties in the instant action must be the same as or in privity with the parties in the prior action in question. Second, the court that rendered the prior judgment must have been a court of competent jurisdiction. Third, the prior action must have been terminated with a final judgment on the merits. And fourth, the same claim or cause of action must be involved in both suits. *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994).

Here, the Fifth Circuit was correct in rejecting Blue Streak's assertion that the parties hereto need not be identical to or in privity with the parties in the prior suit for claim preclusion to apply. As set forth above, this Court eliminated the requirement of mutuality in applying collateral estoppel to bar relitigation of issues decided earlier in federal court suits, but did not eliminate in *Blonder-Tongue* the mutuality requirement for claim preclusion.

Accordingly, the Fifth Circuit correctly held that the indentity of the parties requirement is not satisfied in this matter. Even assuming arguendo that Blue Streak was in privity with the named but unserved "Blue Streak/Gulf Island", because that party was never properly before the court in the 1985 action, the identity of the parties requirement is not satisfied. Petitioner's alternative argument, that it is in privity with Wausau, Gulf Island's insurer against which it had brought first party claims in the 1985 action, was rejected for similar reasons. Wausau was a

defendant only with regard to the hull policy coverage dispute brought by its insured, Gulf Island, not as the liability insurer of the negligent third party, Blue Streak. Accordingly, the Fifth Circuit found Wausau was not so closely aligned to Blue Streak's interest (if any) in the 1985 ~~action as to~~ be Blue Streak's representative.

It is important to note that even if the mutuality requirement of claim preclusion were eliminated, claim preclusion would remain inapplicable herein as a result of the fact that Blue Streak cannot satisfy the remaining requirements for claim preclusion to apply. Although the Fifth Circuit did not reach these issues as a result of the finding that the mutuality requirement had not been satisfied, even a brief review of the facts indicates that the other requirements of claim preclusion cannot be satisfied in this matter.

For example, it is clear that the 1985 action did not terminate with a final judgment on the merits. The parties in the 1985 action agreed on a preliminary basis to a settlement and so advised the district court. The court entered an order of dismissal without prejudice, expressly reserving the right to reopen the action within 60 days if the settlement was not consummated. Because the parties could not agree on the breadth of the settlement, the settlement was never consummated and the minimal settlement check never negotiated. Thus, the settlement was never consummated as contemplated by the order and final judgment was never rendered. A dismissal such as in the present matter, entered into by agreement of the parties without prejudice, does not have preclusive effect, and accordingly does not bar a second suit on the basis of claim preclusion. *Plumberman, Inc. v. Urban Systems Development Corp.*,

605 F.2d 161, 162 (5th Cir. 1979); *American Heritage Life Insurance Co. v. Heritage Life Insurance Co.*, 494 F.2d 3, 9 (5th Cir. 1974).[2]

Additionally, the same claim or cause of action was not involved in both suits. The 1985 action involved a cause of action against the hull underwriters by Gulf Island as an assured under the hull policy. Similarly, the consolidated Hope action in which "Blue Streak/Gulf Island" was named but not served as a defendant, was a suit against Gulf Island on an account for salvage and repair of the vessel arising from the hull underwriters' failure to make the required payments. Blue Streak's operational negligence was never at issue in either the 1985 action or any action consolidated therewith, including the Hope contractors action. Blue Streak's negligence has never been put at issue prior to the instant action. In sum, claim preclusion will not apply in this matter, regardless of the application of the mutuality rule.

III. MUTUALITY IS AN ESSENTIAL ELEMENT OF CLAIM PRECLUSION AND NECESSARY TO ENSURE FAIRNESS TO THE PARTIES.

Blue Streak alleges that the mutuality rule should no longer apply to the doctrine of claim preclusion and that this Court should eliminate the requirement in the interest

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[2] Additionally, even if a final judgment on the merits had been reached in the 1985 suit and actions consolidated therewith, Blue Streak was not a party and its liability was never at issue. When "an outsider is not before the court, he cannot be bound by the judgment rendered." *Provident Tradesmen Bank & Trust v. Patterson*, 390 U.S. 102, 110, 88 S. Ct. 733, 738, 19 L. Ed. 2d 936 (1968). Accordingly, "a judgment is not res judicata as to . . . a non-party." *Id.*

of judicial economy. Blue Streak suggests that eliminating the mutuality rule for issue preclusion, but not with regard to claim preclusion, is an unsound distinction, although neither this Court nor any federal appellate court has so indicated.

Blue Streak's argument for the elimination of the mutuality rule in the claim preclusion setting, while potentially appealing in its simplicity, is without merit. Claim preclusion and issue preclusion are distinct doctrines, with different objectives and requirements. *Allen,* supra, 449 U.S. at 94, 101 S. Ct. at 415; *Shanbaum,* supra at 310-11. Claim preclusion, or "pure" *res judicata,* conserves judicial resources and protects litigants from multiple lawsuits by prohibiting either party from raising any claim or defense in a latter action to which they are a party that was or could have been raised in support or in opposition to the cause of action asserted in the prior action. See e.g., *In Re Howe,* 913 F.2d 1138, 1144 (5th Cir. 1990). In contrast, issue preclusion promotes the interest of judicial economy by treating specific issues of fact or law that are validly and necessarily determined as final and conclusive.

The basis for eliminating the mutuality rule with respect to issues fully litigated is inapplicable in a claim preclusion setting. Issue preclusion requires that the issue be identical to the issue vigorously and necessarily decided in the prior case and there must be no special circumstances that would render preclusion inappropriate or unfair. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326-32, 99 S. Ct. 645, 649, 588 L. Ed. 2d 552 (1979).

In contrast, for claim preclusion to apply, there is no

requirement of identity of the issues, since claim preclusion applies to matters which could have been raised but were not. Similarly, claim preclusion does not require the claim to have been vigorously litigated in the prior action and necessary to support the judgment, but only that it could have been brought. Finally, claim preclusion, unlike issue preclusion, does not require an examination of special circumstances which might exist which would render preclusion inappropriate or unfair.

Thus, the focus for claim preclusion is on the parties, while the focus for issue preclusion is on the issues. Eliminating the mutuality rule for issue preclusion is appropriate as a result of the stringent safeguards provided by the remaining elements of issue preclusion, particularly the fact that the identical issue must have been fully litigated by or against the party against whom issue preclusion is offensively raised. However, because claim preclusion will eliminate the relitigation of all claims which could have been raised by the parties or their privities, by necessity the parties requirement, i.e., the mutuality rule, must remain. Clearly, the claims that are or could have been raised in a particular action are dependent upon the parties. While it is reasonable and logical to apply claim preclusion to these parties and those in privity with them, it is unsupportable to go beyond that limitation.

As indicated above, Blue Streak attempts to make an issue out of a historically grounded and equitable rule of law simply because it cannot challenge the Fifth Circuit on other grounds. The reasons for eliminating mutuality do not apply to claim preclusion. If the mutuality rule were to be eliminated, it would produce the very effect that con-

cerned this Court in *Blonder-Tongue*, namely that a party would be denied his right to litigate his grievances in an open court of law. Therefore, petitioner's stab at a doctrine unmarked with controversy, at the risk of sacrificing due process and equity, should be denied.

CONCLUSION

This case does not present a question of federal law which has not been, but should be, settled by this Court. On the contrary, petitioner asks this Court to discard a rule of law that has been widely accepted and applied without issue by this Court and the federal courts of appeals. Additionally, not only did the Fifth Circuit correctly hold that the identity of parties requirement had not been met in this matter, the other elements of claim preclusion also have not been satisfied.

Finally, petitioner's novel assertion that the mutuality rule should no longer apply to claim preclusion is based upon faulty reasoning. The rationale for the elimination of the mutuality requirement for issue preclusion is inapplicable to claim preclusion. Respondent, Gulf Island IV, therefore, respectfully requests the petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of this Opposition to Blue Streak, Inc.'s Petition for Writ of Certiorari have been mailed to the following parties through their attorney of record this 30th day of January, 1995.

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